FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1852, *Et Al.*

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

v.

SHELL OIL COMPANY, *Et Al.*,
Respondents

On A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ALASKA IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF ALASKA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS THE STATE OF ALASKA

Among the rich resources of Alaska are large known reserves and promising potential sources of natural gas. The Prudhoe Bay Field contains the largest accumulation of oil and gas ever discovered on the North American continent.[1] The main pool of the Prudhoe Bay field contains more than twenty trillion cubic feet of saleable natural gas.[2] The two other pools of that

[1] Executive Office of the President, Energy Policy and Planning, *Decision and Report to Congress on the Alaska Natural Gas Transportation System*, at i (September 1977). (Hereinafter "*President's Decision*").

[2] *Id.*

field, although less well-explored, are estimated to contain 3.5 trillion cubic feet of saleable gas.[3] Cook Inlet resources, onshore and offshore, are estimated by State of Alaska officials at 18.4 trillion cubic feet.[4] No Alaska gas yet flows in interstate commerce although projects for delivery of gas from both Cook Inlet and Prudhoe Bay are being pursued at the Federal Energy Regulatory Commission (the "FERC" or the "Commission").[5]

The abundant gas resources coupled with little industry and a small population suggest that Alaska will be a fruitful source of natural gas for the interstate market.

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[3] Federal Energy Administration, Department of Commerce, Department of the Interior, Department of Transportation, Department of Treasury, Energy Research & Development Administration, *Report of the Working Group on Supply, Demand and Energy Policy Impact of Alaska Gas*, Table I-2 (July 1, 1977).

[4] State of Alaska, Division of Geological and Geophysical Survey, *Energy & Mineral Resources of Alaska, Alaska Open File Report 50*, Table I, June 1974.

[5] Small quantities of gas from Cook Inlet are used in the Anchorage area. Also, liquified natural gas from Cook Inlet is shipped to Japan, but, under well-established precedent, this movement of natural gas is "foreign," as opposed to interstate commerce, *Distrigas Corp.* v. *F.P.C.*, 495 F.2d 1057, 1062-64 (D.C. Cir. 1974), *Border Pipeline Co.* v. *F.P.C.*, 171 F.2d 149 (D.C. Cir. 1948). This export of gas was authorized by the Federal Power Commission, pursuant to Section 3 of the Natural Gas Act, 15 U.S.C. § 717b, in 1967.

Pursuant to the procedures created by the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 *et seq.*, a route for the transportation of Prudhoe Bay Gas to the lower 48 states has been selected by the President and approved by the Congress. See generally *President's Decision*, *supra*. Further proceedings concerned with implementing the decision and the specific facilities needed therefore are being, or will be, conducted by the FERC and other agencies.

The State of Alaska, exercising its police powers, regulates the production of oil and natural gas through state agencies.[6] Its interest in this case is with any potential encroachment upon the proper exercise of its regulatory responsibilities. A broad ruling contrary to the Court of Appeals' opinion would hinder the development of the nationally needed oil and natural gas supplies known to exist and expected to be found in Alaska.

This concern is not mooted by the passage of the Natural Gas Policy Act of 1978 which eliminates producer sales certificate requirements from all gas not committed or dedicated to interstate commerce as of November 8, 1978, and from some other categories of committed or dedicated gas. Because Alaska gas has not yet flowed in interstate commerce, Alaska gas would not appear to be subject to the requirements of Order 539-B which arise from producer sales certificates.[7] The Staff of the FERC has, however, recently asserted that Cook Inlet gas is so committed or dedicated.[8] The State

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[6] The State of Alaska regulates all aspects of oil and gas production within Alaska so as to prevent waste, to protect correlative rights of persons owning interests in the tracts of land affected, and to ensure a greater recovery of oil and gas. This includes the right to regulate the quantity and rate of production from a well or property. ALASKA STAT. § 31.05.030(e). Prior to January 1, 1979, these powers are being exercised by the Oil and Gas Conservation Division of Alaska's Department of Natural Resources. After January 1, 1979, the Alaska Oil and Gas Conservation Commission, an independent quasi-judicial agency of the State will perform these functions.

[7] See Brief for the Federal Energy Regulatory Commission, at 15-16 (hereinafter "FERC Brief").

[8] Commission Staff Reply Brief on State of Alaska Royalty Gas Issues, FERC Docket Nos. CP75-140, *et al.*, November 21, 1978, at 7.

of Alaska believes this view is incorrect and has so informed the Commission. Because of the dispute over Cook Inlet Gas, and an inability to predict how expansively the Commission will seek to interpret its remaining power over producer sales under the Natural Gas Act, Alaska is concerned with the possible interference with fundamental state powers that could result from the Court's holding.

ARGUMENT

THE COURT OF APPEALS' OPINION SHOULD BE AFFIRMED BECAUSE IT RESPECTS, AND GIVES FORCE TO, THE STATUTORY BALANCE BETWEEN STATE AND FEDERAL REGULATION

1. The Natural Gas Act Was Carefully Drawn To Preserve State Control Over Production and Gathering

The Natural Gas Act was drawn by Congress to occupy a field in which the Supreme Court had held* that the states may not act: interstate sales and transportation of natural gas. *See,* H.R. No. 709, 75th Cong., 1st Sess., 1-2; S.R. No. 1162, 75th Cong., 1st Sess., 1-2; *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672, 683-4 n. 13 (1954). This dominant purpose did not extend to the physical acts of drawing natural gas from the earth and preparing it for transportation for these were not thought to be proper subjects of federal regulation and there was no pattern of abuses which called for legislative relief. Indeed, at the passage of the Natural Gas Act, production and gathering were commonly understood to be functions properly regulated by the states, and no question then had been

* *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924); *Public Service Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

raised of the effectiveness or propriety of state regulation. *See Champlin Refining Co.* v. *Corporation Commission of Oklahoma,* 286 U.S. 210, 235 (1932). For these reasons, regulation of production and gathering was expressly excluded from the Commission's reach.

The legislative purpose was to create a comprehensive statutory scheme of *federal* regulation of interstate sales and transportation and of *state* regulation of production and gathering. Both federal and state powers were needed to create the comprehensive whole.

This purpose has been recognized and consistently expressed in the decisions of the Court. In *F.P.C.* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972), for example, the Court stated:

> "To that end, Congress 'meant to create a comprehensive and effective regulatory scheme,' *Panhandle Eastern Pipeline Co.* v. *Public Service Commission,* 332 U.S. 507, 520 (1947), *of dual state and federal authority.* Although federal jurisdiction was not to be exclusive, F.P.C. regulation was to be broadly complimentary to that reserved to the states, so that there would be no 'gaps' for private interest to subvert the public welfare." (406 U.S. at 631) (emphasis added).

The importance of State regulation to the federal scheme also has been recognized in the decisions of the Court. In *United Gas Improvement Co.* v. *Continental Oil Co. ("Rayne Field"),* 381 U.S. 392, 403 (1965), the Court stated:

> "The 'production or gathering' exemption relates to the physical activities, processes and facilities of production or gathering, but not to sales of the land affirmatively subject to Commission jur-

isdiction. This accommodation of the two relevant clauses of § 1(b) gives content to the potential objectives of the Natural Gas Act as expanded in *Phillips*, and to the Commission's jurisdiction to accomplish them, *while in no way interfering with state regulatory power over the physical processes of production or gathering in furtherance of conservation or other legitimate state concerns.*" (emphasis added).

2. Order 539-B Invades the Production or Gathering Exemption

The central question before the Court is whether Order 539-B, and the arguments in support of it advanced by the FERC, properly respect the legitimate areas intentionally reserved for state regulation by Congress in Section 1(b) of the Natural Gas Act and by the decisions of the Court construing that Section. The Court's decision on this issue must harmonize the respective state and federal interests expressed in Sections 1(b) and 7,[10] consistent with the Court's responsibility to give meaning to all parts of a statute.[11]

Little time need be spent on whether the activity to be brought within the ambit of Commission power by Order 539-B directly concerns production and gathering. What Order 539-B concerns is not activity *incidental* to the physical acts of drawing forth gas from

[10] Both Sections 1(b) and 7, it must be recalled, express constitutional powers which underscore the necessity of a proper balancing of those interests in this case.

[11] " 'The cardinal principle of statutory construction is to save and not to destroy.' . . . It is our duty 'to give effect, if possible, to every clause and word of a statute,' . . . rather than to emasculate an entire section. . . ." *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (citations omitted).

the earth and gathering it, but production and gathering themselves:

> "[*The prudent operator*] *standard encompasses* the obligations to develop the properties consistent with the performance requirements of lease agreements, *all valid rules and regulations of any Federal, state or local government having jurisdiction; and the standard of what a reasonably prudent producer would do with respect to the drilling*[,] *completion, workover, recompletion or abandonment of wells.*" 41 Fed. Reg. at 32884. (emphasis added).

And, the established meaning of the standard encompasses *all* operations of a producer, including the rate of offtake, development, methods of gathering, etc. *See generally* H. Williams and C. Meyers, *Oil and Gas Law*, § 806 *et seq.*, at 27 *et seq.* (1977).

The FERC has endeavored to defuse state concerns by the suggestion that state law is the "yardstick" by which compliance will be measured.[12] FERC Brief at 33. But it appears that FERC is not imposing a requirement of following state determinations, it is im-

[12] The FERC expressly recognizes that state law determines the responsibilities of the producer under the standard:

> "Far from conflicting with legitimate state regulatory requirements, the prudent operator standard expressly encompasses those requirements and constitutes the very standard under which the producers claimed they were already operating . . .
>
> "*This standard does not imply federal obligations different from those imposed by the states either under the terms of leases or under state conservation laws. On the contrary, it is to be administered with reference to those state standards.* The Commission's standard simply requires that the producer operate in accordance with established practice and with requirements adopted by the jurisdiction exercising direct regulation over the production." (FERC Brief at 31-32).

posing an independent requirement paralleling state requirements; an independent requirement for which FERC determines compliance or non-compliance. If the FERC has authority to impose a standard, albeit adopted from state law, it will argue that it has primary authority in its application in a particular case.[13] Practically, the FERC would have final and complete authority over all state laws concerning production and gathering activities insofar as those laws affect producers supplying gas to the interstate market under Section 7 certificates.

The potential for conflict is well near inevitable. The FERC's own description of the areas it desires to control is illustrative of the large arena for disagreement between the FERC and a state over particular applications:

> "If a certificated producer *unreasonably* shuts in its wells or *otherwise unreasonably* reduces production; or *fails to take prudent steps* to maintain its equipment, so that production and delivery cease *through simple neglect*; or fails to develop its dedicated properties in accord with the *requirements of its lease and applicable state law*, it has effectively abandoned service without the Commission's approval." (FERC Brief at 22) (emphasis added).

As we shall argue below, the reach of the Commission's powers under Section 7, though great, does not extend to activities encompassed within the exclusion of Section 1(b). Thus, the Commission cannot embrace basic production and gathering decisions, as it proposes to do, within Section 7, without frustration of

[13] See, e.g. Brief of Petitioner Consumer Energy Council of America, pp. 57-58, n.36.

the Congressional intent, and violation of the statutory scheme.

To be sure, Congress could have committed these matters exclusively to federal regulation, but chose not to. And no issue has been raised of state regulation burdening or discriminating against interstate commerce. None could be raised for what are involved are garden-variety state conservation decisions—well-suited to state regulation by their nature and intentionally left to the states by Congress.[14] The wisdom of the statutory scheme is reaffirmed by the nature of the regulatory judgments state authorities are called upon to make. These judgments can encompass trade-offs between oil and gas production from a single field, between immediate production and ultimate recovery, and between the risk of field damage from secondary or tertiary recovery techniques and the benefits of higher ultimate recovery.

Alaska does not contend that a regulation concerning supply could not be drawn that would not intrude on the production or gathering exemption, for the Court concededly has held that that exemption must be narrowly construed and the Commission has legitimate concerns with supply. *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 690-691 (1947). Even under the narrowest possible construction of the production or gathering exemption, however, the wholesale adoption of state laws over all producer activities, with provision for the FERC determination of the application of those standards, must inevitably violate the Act.

[14] E.g., *Bayou Field*, *supra*, 381 U.S. at 402 ("... while in no way interfering with state regulatory power over the physical processes of production or gathering in furtherance of conservation or other state concerns.") (emphasis added).

3. The Decisions of the Court Do Not Support the Commission

The crux of the Commission's argument is that the affirmative grant of jurisdiction contained in Section 7 carries with it the power to control the actions of certificate holders even as respects production activities should those actions bear upon the "national objectives" of the Act. FERC Brief at 23-30. The Commission suggests that the exemption of Section 1(b) does not limit Section 7 powers and the protection for State regulatory powers embodied in Section 1(b) must give way in the face of national objectives and the Commission's power to enforce certificate requirements. FERC Brief at 23-30. The Commission does not give a fair reading to the Natural Gas Act or its legislative history.

First, although the Committee reports, described in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), state that language expressing the production or gathering exemption was not thought essential, the conclusion was reached not because production and gathering were not thought to be reserved to the states, but because production and gathering "could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission." H. R. Rep. No. 709, 75 Cong., 1st Sess. No one then foresaw the expansive reading of Section 7 powers now urged. The production or gathering exemption did not limit Section 7 powers because Section 7 powers never were intended to reach production and gathering. It cannot fairly be contended that where the direct extension of Commission sales and transportation jurisdiction to production and gathering is proposed, expressions of legislative intent based upon a premise of statutory harmony between those powers are in any way applicable. Further, the language of the Natural Gas Act,

as adopted, did contain the exclusion and the Court must give meaning to all parts of the statute.

Second, no support for the Commission's view can be found in the trilogy of cases involving *sales* transactions which the Commission has cited. FERC Brief at 25-30. For while the assertion was there made that the various forms of sales transactions were part of production and gathering, the Court did not have before it transactions which go to the heart of the production or gathering exemption, but with transactions which were, in form, sales, or efforts to escape the Commission's sales jurisdiction.[15]

No argument can be made here that a sales transaction is at issue. However narrowly the exemptions to Section 1(b) may be construed, they must be left with a core of meaning. It is that core which is invaded by the Commission's assertion of jurisdiction over production. A decision about the proper level of activity or the failure to develop properly a producing field is the essence of a conservation decision and not one at the periphery of production powers.

Rayne Field, supra, is not to the contrary. Although the sales there occurred "before" production started, the Court was concerned with a form of sales transaction or, some would say, an attempt to evade sales jurisdiction. There was no contention, however, that the sale

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[15] The issue before the Court is not one of concern with state regulation which directly or indirectly subverts the price regulation of interstate sales committed undeniably to federal power. The issues raised by *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas,* 372 U.S. 84 (1963), therefore, are not present here. For the part of the Court of Appeals holding and the Commission's Order with which Alaska is concerned is that which embodies and adopts state regulatory standards to measure reasonably prudent operation.

of leaseholds was itself a production function. The Court's language that a sale "before production or gathering is ended" is "nonetheless subject to regulation" (381 U.S. at 402) in no way diminishes the legitimate exclusion of Commission regulation over *production* and *gathering* themselves. The very language cited by the Commission from *Rayne Field* emphasizes the maintenance of the state's powers over the physical activities, processes and facilities of production or gathering. FERC Brief at 27-28.

The Commission's Brief never squarely faces the question what would remain of the production or gathering exemption if its position prevails. If Order 539-B is upheld, the states would be shorn of their power to regulate production and gathering except insofar as such production and gathering are confined to those categories of gas from which Section 7 requirements have been removed by the Natural Gas Policy Act of 1978. The production or gathering exemption has greater meaning than the Commission would allow.

The State of Alaska does not contend that the Commission lacks power to enforce the obligations of producers to continue the service of delivering gas from dedicated reserves. The Commission, however, has chosen a regulatory scheme which invades powers reserved to the states. The Commission is not powerless to achieve its goals, but the particular path it has chosen is not consistent with the statutory language, the Congressional intent, or a realistic balance between the appropriate responsibilities of the state and Federal governments.

* * * * *

The arguments of the *amici* supporting the Commission may be reduced to the basic contention that there

is a need for federal regulation of gas supply obligations. It appears that this argument is not persuasive for Congress has recently legislatively removed from much natural gas Section 7 type regulation. FERC Brief at 15-16. Thus, the perception that there is a need for enlarged regulatory powers is not shared by those who give the Commission its legal powers. Moreover, even if the need does exist, "a *need* for federal regulation does not establish FPC jurisdiction that Congress has not granted." *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 635-636 (1972). The Commission should endeavor to satisfy whatever legitimate concerns it has with supply within the statutory framework of the powers granted it by Congress, and not by interference with powers expressly reserved to the states.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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